In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, v. THE CHEROKEE NATION.	No. 346.
THE EASTERN CHEROKEES, APPELLANTS, v. THE CHEROKEE NATION.	No. 347.
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APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

THE ATTEMPT TO CONSTRUCT AN ACCOUNT STATED OUT OF THE SLADE AND BENDER REPORT.

The counsel for the Cherokee Nation are so insistent upon the proposition that the Slade and Bender report is an account stated, despite the fact that the contention received such scant courtesy in the Court of Claims, that politeness seems to demand a somewhat more extended consideration of the same on the part of the United States than is given in its main

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brief. As to what constitutes an account stated, there is, or should be, no controversy. The essence of an account stated is a balance resulting from a statement of mutual accounts agreed upon between the debtor and creditor to be correct. And hence, in the very nature of things, the minds of the parties must meet. (A. and E. Enc. of Law, 2d ed., p. 442.) Each party must understand the transaction as a final adjustment of the respective demands between them, and they must come to an agreement as to the allowance or disallowance of the items composing the account and as to the balance struck. (Ib., p. 443.) There must be a definite acknowledgment of indebtedness. (Ib., 445.) An account stated, then, is a recital of facts, not theories, or, as said by his honor, Chief Justice Nott, in the case of *Nutt* v. *The United States*, 23 C. Cls., 73—

> "an account stated" grows out of commercial transactions, being the rendition of a running account by one party to the other and his acceptance or acquiescence in its accuracy and amount. It is therefore, in legal effect, but a liquidation of fractional items into a single amount by the agreement of parties, express or implied.

Examining the Slade and Bender report in the light of these definitions of an account stated, the United States concedes, without hesitation, that it is an account stated so far as it deals in facts—that is to say, in a recital of the mutual accounts between the parties, and it is only when it proceeds to make "assumptions" with relation to those facts and to superadd to

them judicial interpretations of various treaties and statutes that the United States contends that it loses its character of an account stated.

This view was first manifested by Congress in refusing to accept the conclusions of law set forth in the Slade and Bender report until they could be examined and reported upon by the Attorney-General of the United States. And from the time that Congress received the report of the Attorney-General disagreeing with the all-important conclusion of law in the Slade and Bender report, the United States, acting through Congress, has steadfastly refused to recognize the Slade and Bender report. Thus we find an utter lack of a meeting of the minds of the parties with relation to the balance resulting from the *assumptions* in the Slade and Bender report. In other words, the essential element of an account stated, which is a mutual agreement as to the amount due, is entirely wanting. And yet the claimant Cherokee Nation would have this court proceed upon the understanding that the exact reverse is the case.

In short, they ask this court to refrain from making the slightest examination into the merits of their claim, but instead to accept the judicial determination of the same made by two laymen and interjected by them into an account which they were appointed to render on behalf of the United States to the Cherokees—a determination which, according to the Court of Claims, is contrary to law—all upon the assumption that the United States and the claimant have mutually agreed to this identical conclusion of law; and this,

although the whole history of the case shows that the United States has steadfastly repudiated that conclusion since the time it was first brought to its attention.

Furthermore, this account was a statement rendered by agents of the United States. As such agents they of course must act strictly within the scope of their authority. In the case of *State* v. *Brown* (10 Oregon, p. 215), the court disposes of a very similar contention respecting a decision of the secretary of state, as follows:

> Another point contended for by the appellant is that if the auditing and allowance of a claim by the secretary should be deemed to be of no effect as a judicial determination, still it would operate to convert the same into an account stated and bar any recovery in an action at law where mistake only is alleged. But a stated account in this sense derives all its force from the agreement of the parties, express or implied. It is, in effect, a new contract in writing, and is equally conclusive in an action at law.
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> In the case here, there was no opportunity for any agreement. The secretary did not and could not have entered into any contract with the claimant. He was authorized to allow just what was due the claimant, according to his judgment, and was not justified in allowing anything beyond. If the State had contracted to pay so much, the secretary's power to audit the claim and allow what should appear to be due thereon, did not authorize him to enter into a new contract with the claimant through the form

> of a stated account, by which the latter might assert a claim to a greater amount than should be found due him under his original contract with the State.
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> We think the secretary has no power to state an account with a claimant which will bind the State in this manner (pp. 228–9).

In the Nutt case, *supra*, this court, in affirming the decision of the Court of Claims, said through Mr. Justice Matthews:

> The same reasons dispose of the second proposition, and show that the report of the Quartermaster-General is no more an account stated between the parties than it is an arbitration and award. In order to constitute an account stated between individuals, the statement of the account must be adopted by one party and submitted as correct to the other. But here Congress did not adopt the report of the Quartermaster-General as its statement of what was due from the United States; nor was the report submitted to the claimant as a correct statement of the indebtedness. (125 U.S., 655.)

Upon this contention of the claimants the following comments in the Quarles report, heretofore referred to, are very pertinent:

> Now, the question is whether an agent authorized to render an account is empowered to do more than collect and arrange the several items in the nature of "debit and credit." Is it possible that under such an authorization the agent can set aside or ignore deliberate settlements theretofore made by the parties? Can he re-

> verse the construction put upon treaties by his principal, accepted by the other party, and mutually acquiesced in for years? Is he authorized to pass upon vexed questions of law and to bind his principal by his conclusions simply because he arranges such conclusions in the form of an account? In our opinion, the Government is not concluded by the findings of Slade and Bender, involving as they do many delicate questions of law upon which we are entitled to have the opinion of the Supreme Court before assenting to such radical legal conclusions.

THE TREATY OF 1828.

The agreement of the United States in the treaty of 1828 with the Western Cherokees, to pay the cost of emigration of all such Eastern Cherokees as might remove to the West and to subsist them for one year, seems to be greatly relied upon in the brief for the Eastern Cherokees. It appears, however, to have no relevancy or force in the present case, other than as it is an indication of the policy of the Government. This policy, as set forth in article 8 of that treaty, was to induce the Eastern Cherokees to remove. But the treaty of 1828 was made with the Western Cherokees and not with the Eastern Cherokees, and therefore, of course, it contains no mutual agreements between the United States and the Eastern Cherokees on the subject of removal.

On the contrary, the treaty of New Echota was with the Cherokee tribe of Indians, and the occasion and

express purpose of it was the removal of the Eastern Cherokees, which the Cherokees agreed unconditionally to do within two years. The treaty also provided, according to the contention of the United States, that the cost of such removal should be paid out of the $5,000,000 treaty fund, whereas the Cherokees contend that by the terms of the treaty all cost of removal above the $600,000 addition to the treaty fund must be borne by the United States.

So, in either view of the question, the treaty of New Echota contained mutual and complete agreements between the United States and the Cherokees on the subject of removal, thus, of course, wholly doing away with the unilateral agreement of the treaty of 1828 on that subject

THE OPINION OF ATTORNEY-GENERAL BUTLER.

Attorney-General Butler, in his opinion on the subject of compensation to Cherokee reservees (3 Op. A. G., 297), makes this comment:

> The expense of removal is undoubtedly the first charge on the fund of $600,000, the removal of the nation being an object of necessity and paramount importance, and the balance is to be applied to the satisfaction of the various claims which shall have been established.

There seems to be great reliance placed upon this observation by counsel for the Eastern Cherokees. The reason for it, however, is not plain. The cost of removal is undoubtedly mentioned first in the third supplementary article, and it was probably an expense of

more vital importance to the general body of Cherokees than the payment of the various claims, including spoliations, also provided for in that fund. But there is nothing in the wording of the article that makes the cost of removal any more legitimate a charge upon the $600,000 fund than the claims for spoliations, for instance. Certainly under its provisions, the United States would have been warranted in paying the claims for spoliations in full out of this fund, even at the expense of a portion of the cost of removal. But however that may be, this opinion does not touch upon the question at issue in this case, and it is only by the most speculative inferences therefrom that a guess might be made as to what would have been the opinion of Attorney-General Butler on that question.

THE OPINION OF ATTORNEY-GENERAL LEGARE.

This opinion (4th Op. A. G., 73) relates simply to the expenses of the commissioners under the Cherokee treaty, holding that such expenses are not a proper charge upon the treaty fund. This very matter was considered in the subsequent treaty of 1846, and provision made for it and other improper charges in article 3 of that treaty. That is all there is to it, and nothing more can be made out of it.

THE RELATION OF THE SECRETARY OF THE INTERIOR TO THE SLADE AND BENDER ACCOUNT.

In the brief for the Eastern Cherokees a quotation is made from the opinion of the Court of Claims, wherein Chief Justice Nott says that it was in the dis-

cretion of the Secretary of the Interior to accept or adopt the Slade and Bender report, or to remand it for alterations and corrections; that "he was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. The Secretary did not recall the account, the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was at the same session, or certainly within the prescribed twelve months, to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered." (Rec., p. 51.)

The agreement in the treaty of 1893 for this accounting furnishes no warrant for the contention that the Secretary of the Interior had any discretion whatever in the premises. Through his Department, to be sure, the accountants were selected, but as far as the United States was concerned, in Congress alone was vested the authority to act upon the same. The logical result of this contention is, that if the Secretary of the Interior had been of the opinion that the five million dollar treaty fund had been properly charged with the extra cost of removal, he might have rejected any account that did not so recite; and yet that, according to the opinion of the court, would have been to thwart absolutely the intention of the agreement for the accounting. Surely such plenary power in an executive officer

of the Government to render naught the provisions of a solemn treaty could only exist by explicit recital.

And yet the Secretary of the Interior is not even mentioned in the treaty of 1893 in connection with this agreement for an accounting. Indeed, the opinion of the court itself, as above cited, goes on to recognize the authority of Congress in the premises and to criticise that body for not calling for another account within the twelve months. But this criticism does not seem to be justified. The account was accepted by the Cherokee Nation on December 1, 1894, and on January 8, 1895, was transmitted by the Secretary of the Interior to Congress. Congress, finding that the account contained conclusions of law, called upon the Attorney-General, in the appropriation act of March 2, 1895, in the closing days of the session, to review and report upon these conclusions of law. The reply of the Attorney-General was made to Congress at the opening of the following session, but by that time over twelve months had elapsed since the acceptance of the account by the Cherokees, and, accordingly, in view of that report, there was nothing further for Congress to do in the matter, its disapproval of the report being unmistakable.

TRUST FUNDS.

The five-million-dollar fund is treated in the brief for the Eastern Cherokees as a trust fund, and therefore sacred.

As a matter of fact but $500,000 of this fund was a trust fund. The remainder, less $500,000 for addi-

tional lands, was, by the express terms of the treaty of New Echota, made applicable to the payment of various expenditures, largely to individuals, the amount paid to individual Indians for improvements alone being over $1,500,000, and for ferries owned by individual Indians $160,000, in round numbers. Finally, the surplus was devoted to and was paid to the Indians per capita, and not held in trust for them at all. It is simply trifling with the plain meaning of the words "trust fund," especially as used with reference to Indians, to say that the sums thus intended and used were in any sense a trust fund.

THE USE OF THE APPROPRIATION OF 1838.

Counsel for the Eastern Cherokees place much stress upon the fact that but $49,000 was used out of the appropriation of $1,047,000 made for expenses of removal and subsistence by the act of June 12, 1838, whilst the remainder was applied to the cost of subsistence. But the explanation of this fact is very simple. At that time, in the view of the United States authorities, the treaty fund of five million dollars was chargeable with all extra cost of removal and subsistence, and such, indeed, was the situation until the Senate in 1850, as an act of grace, decided that the United States should bear the cost of subsistence. Accordingly, it was clearly a matter of indifference whether the appropriation of 1838, the greater part of which was in terms for subsistence, were used in whole or in part for that purpose, since the net result to the Indians must be exactly the same. It is obvious, too, that the

subsistence of the Indians for one year after their removal was a matter that must of necessity first be provided for, and thus we find that the sum of $487,000, part of the cost of removal under the Ross contract, was not paid until 1841. (Rep. No. 288, p. 2.)

VESTED RIGHTS UNDER THE TREATY OF NEW ECHOTA.

Article 10 of the treaty of 1846 provides that nothing in that treaty shall be so construed as in any manner to take away or abridge any rights or claims of the Eastern Cherokees under the treaty of New Echota. Relying upon this article, counsel for the Eastern Cherokees contend that its force is to constitute the payment of any portion of the cost of removal of the Eastern Cherokees out of the five-million-dollar fund an impairment of their rights under the treaty of New Echota, but that, of course, is simply a begging of the whole question.

ARTICLE 3 OF THE TREATY OF 1846.

By article 3 of the treaty of 1846, it is provided, amongst other things, that—

> Whereas the expenses of making the treaty of New Echota were also paid out of said fund [of five million dollars] when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all the other sums paid to any agent of the Government and improperly charged to said fund.

These payments to various agents of the Government amounted to $96,999.42, which amount was re-

imbursed the Indians by the appropriation act of April 27, 1851 (9 Stat. L., p. 572; see Rec., p. 98), the amount there appropriated being made up of the balance found due in the accounting made under article 9 of the treaty of 1846 with the Eastern Cherokees, $627,603.95, and the payments to agents above stated of $96,999.42. (Slade and Bender Report, pp. 21 and 22.)

And now, at this eleventh hour, come the counsel for the Eastern Cherokees and say, on page 84 of their brief:

> The amount now sued for was paid to Captain John Page, an "agent of the Government," in 1838, and expended by him on account of removal expenses and was "improperly charged to said fund," and under the 3d article of this treaty should be reimbursed.

This is a most momentous contention, and yet it is proffered as delicately as though it were a rose leaf. What is the explanation of this modest coyness in setting forth a proposition which, if true, is the end of controversy in this case? Plainly, that counsel place no sort of reliance upon a contention so novel that it has never before occurred to the claimants, and was not even hinted at in the protest of the Cherokee Nation made on the 27th of November, 1851, against the accounting under article 9 of the treaty of 1846. (Rec., pp. 98–99.) It needs only a glance at the language of article 3, under consideration, to show that it refers only to payments made to agents of the Government for their services and expenses.

These various agents are enumerated in the account of the Eastern Cherokees (Rec., p. 98) as follows: "Superintendents, clerks, interpreters, disbursing, issuing, and enrolling agents, conductors, and contingencies." The Captain Page referred to was the disbursing officer of the Government who handled the various funds appropriated pursuant to the treaty of New Echota and by the act of June 12, 1838, and so far from "the amount now sued for" being paid to him as agent of the Government, every dollar was paid out by him for the United States; and to now contend that the amount of this claim was one of the reimbursements contemplated by the concluding clause of article 3 of the treaty of 1846 is to attempt to juggle with words.

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